CALIFORNIA GAMBLING CONTROL COMMISSION
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Memorandum

Date: February 9, 2005

To: Chairman Dean Shelton
Commissioner J.K. Sasaki
Commissioner Arlo Smith
Commissioner Edward Williams

From: Cyrus J. Rickards, Chief Counsel
John W. Spittler, Counsel

Subject: Staff Recommendation – "Gaming Device"

Issue

Should the Commission direct application of the term "Gaming Device," as defined in the Tribal-State Gaming Compacts (Compact(s)), in a manner consistent with the October 9, 2003 informal legal opinion of the Office of the Attorney General and the April 23, 2004 Advisory of the Division of Gambling Control, so that each terminal or player station of multi-terminal gaming devices is considered to be an individual gaming device?

Conclusion

The Commission direct staff to follow the Tribal Casino Advisory issued by the Division of Gambling Control regarding the term "Gaming Device" so that each terminal or player station attached to a gaming system is accounted for as a separate Gaming Device for purposes of carrying out the Commission's duties under the Compact.

Introduction

Under the Indian Gaming Regulatory Act (IGRA), Class III gaming is permitted on Indian land only, among other things, if it is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the state and approved by the Secretary of the Interior." (25 U.S.C. Sec. 2701(d)(1)(C).) While IGRA requires states to negotiate in good faith with eligible tribes, it does not require that states confer upon gaming tribes an *exclusive* right to conduct Class III gaming within the state. In California, Article IV, section 19 of the state Constitution carves out an exception to the general ban on casino gaming and provides that it may be engaged in by federally recognized tribes pursuant to compacts negotiated by the governor and ratified by the legislature. Through these compacts, negotiated on a government-to-government basis,

signatory tribes have acquired this exclusive right to casino gaming.[1] In exchange these tribes, in explicit recognition of that exclusive right, have agreed to provide to the State and, in most instances to non-gaming tribes, a portion of their revenue from Class III gaming. This agreement by the signatory tribes – a portion of gaming revenue in exchange for the exclusive right to conduct Class III gaming - is explicitly recognized in all existing compacts, including the 1999 compact, the amended compacts, and the compacts newly negotiated in 2003 and 2004.[2]

The Compacts rely on a number of defined terms. As outlined in more detail below, central to the agreement by the tribes with the state regarding revenue sharing, as well as the licensing of, and limitations on, the number of Gaming Devices a tribe may acquire and operate, is the definition of "Gaming Device." The definition of the term "Gaming Device" set forth in Section 2.6 of the 1999 Compact, provides:

"'Gaming Device' means a slot machine, including an electronic, electromechanical, electrical, or video device that, for consideration, permits: *individual play* with or against that device or the participation in any electronic, electromechanical, electrical, or video system to which that device is connected; the playing of games thereon or therewith, including, but not limited to, the playing of facsimiles of games of chance or skill; the possible delivery of, or entitlement by the player to, a prize or something of value as a result of the application of an element of chance; and a method for viewing the outcome, prize won, and other information regarding the playing of games thereon or therewith." (Emphasis added.)[3]

Discussion

When the 1999 Compacts were entered into, the Gaming Devices operated by gaming tribes were, with insignificant exception, slot machines with one player station or terminal for each machine and, indeed, the Compact uses the terms device and terminal, interchangeably. In

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[1] Article IV, section 19, subdivision (f), provides in pertinent part:
"Notwithstanding subdivisions (a) and (e), and any other provisions of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts."

The 1999 Tribal-State Gaming Compact, Preamble, paragraph E., states in pertinent part:
"In consideration for the exclusive rights enjoyed by the tribes, and in further considerations for the State's willingness to enter into this Compact, the tribes have agreed to provide to the State, on a sovereign-to-sovereign basis, a portion of its revenues from Gaming Devices."

[2] With regard to the non-amended 1999 Compacts, none of this shared revenue goes to the State General Fund. All of the money contributed to the Revenue Sharing Trust Fund by gaming tribes goes to tribes operating less than 350 Gaming Devices (Sec. 4.3.2(a)(i)). Shared revenues contributed to the Indian Gaming Special Distribution Fund are appropriated by the Legislature for specific statutory purposes and according to specific statutory priorities. (Sec. 5.0 et seq.; Govt. Code Sections 12012.75, 12012.85.)

[3] For purposes of the memorandum, all references to Compact sections are to sections of the 1999 Tribal-State Gaming Compacts. It is recognized that the recently amended Compacts (e.g., that negotiated with the Buena Vista Rancheria of Me-Wuk Indians and others); the Compacts negotiated in 2003 (e.g., that negotiated with the La Posta Band of Mission Indians; and the Compacts negotiated in 2004 (e.g., that with the Coyote Valley Band of Pomo Indians and others) contain differing definitions of the term "Gaming Device". However, none of those definitions require differing conclusions regarding the application of the term Gaming Device to multi-player/terminal set-ups offered in this memorandum and the April 25, 2004 Division of Gambling Control Advisory.

addition to the revenue sharing agreement by the signatory tribes alluded to above (Sections 4.0 and 5.0), the tribes and the state mutually agreed to a procedure for acquisition of licenses to operate additional Gaming Devices through a licensing scheme and limits on the total numbers of licenses (and thereby devices/terminals) available to individual tribes and to tribes statewide. (Sec. 4.3)

In recent years, however, the advent of multi-player/multi-station/terminal gaming technology has caused some tribes to call into question the basis of the revenue sharing agreement and acquisition and limits schemes contained in the Compact. These tribes now argue that multi-player/multi-station/terminal devices, regardless of the number of terminals involved, should be counted as a single Gaming Device. With the advent of technology that would allow a single server to service hundreds of player stations/terminals it is obvious that considering each multi-player station/terminal set-up as a single Gaming Device for purposes of the Compacts, could completely undermine the mutually agreed-upon provisions regarding numbers of gaming devices available statewide and to individual casinos, as well as the revenue-sharing agreements central to the Compacts.

In response to this change in technology and its implications for administration of the Compacts, both the Commission and the California Department of Justice, Division of Gambling Control (DGC, the Division) sought advisory opinions from the Office of the Attorney General. The informal opinion provided to the Commission, dated October 9, 2003, was shared with the Division, presented to the Commission, and released to the public by the Commission during its meeting on December 18, 2003. (Copy attached.)

On April 23, 2004, the Division issued an Advisory entitled "Multiple Player Stations as 'Gaming Device.'" In this Advisory, the DGC advised that each terminal of a multi-player station gaming system should be considered one (1) gaming device. (Copy attached.)

The Division's Advisory, while focusing on different technology, is consistent with the conclusions of the above-referenced informal opinion to the Commission from the Office of the Attorney General. That opinion, in concluding that, under the Compact, each player terminal of a multi-player terminal system should be counted as a single Gaming Device, points out that the terms "Gaming Device" and "terminal" are used interchangeably in the Compact.

For example, Compact section 4.3.1 provides: "The Tribe may operate no more *Gaming Devices* than the larger of the following: (a) A number of *terminals* equal to the number of *Gaming Devices* operated by the Tribe on September 1, 1999; or (b) Three hundred fifty (350) *Gaming Devices*." (Emphasis added.) Section 4.3.2.2 provides a formula for the maximum number of licenses available statewide, a licensing scheme for tribes to acquire licenses in excess of those authorized in section 4.3.1, a per-device schedule for quarterly fees to be paid into the Revenue Sharing Trust Fund, and a per-device pre-payment fee. This entire scheme and the moneys to be paid into the Revenue Sharing Trust Fund contemplate and are dependent upon an interpretation of Gaming Device consistent with the Advisory.

Further, the revenue sharing provisions of Section 5.0 are likewise so dependent and again demonstrate that the Compact contemplated terminal and device as interchangeable. Section 5.1 provides in part, "(a) The Tribe shall make contributions to the Special Distribution Fund created by the Legislature, in accordance with the following schedule, but only with respect to the number of Gaming Devices operated by the Tribe on September 1, 1999."

The accompanying schedule refers to the "number of *terminals*" in the quarterly *device* base and the "percent of average gaming device net". Using these terms, a formula is provided which determines the amount of money a tribe is obligated to contribute to the Special Distribution Fund. Section 5.3 in pertinent part provides, "(a) The quarterly contributions due under Section 5.1 shall be determined and made not later than the thirtieth (30th) day following, the end of each calendar quarter by first determining the total number of all Gaming Devices operated by a Tribe during a given quarter ('Quarterly Device Base'). The 'Average Device Net Win' is calculated by dividing the total Net Win from all *terminals* during the quarter by the Quarterly Terminal Base… (c) At the time each quarterly contribution is made, the Tribe shall submit to the State a report (the 'Quarterly Contribution Report') certified by an authorized representative of the Tribe reflecting the Quarterly Device Base, the Net Win from all *terminals* in the Quarterly Device Base (broken down by Gaming Device), and the Average Device Net Win." (Emphasis added.)

The interchangeable use of the terms "Gaming Device" and "terminal" in the Compact leads to the conclusion that the Compact contemplates and requires each individual terminal connected to a gaming system to be accounted for as single Gaming Device. The plain language of Section 2.6 contemplates that a "Gaming Device" can be a single-player/station machine or each of a number of multiple terminals connected to a gaming system.[4] There is also a pragmatic logic to this interpretation in that each terminal is an individual source of revenue and thus, should be accounted for individually.

Subsequent to the issuance of the DGC Advisory, Commission staff solicited the views of the various tribes at workshops where issues, research and a variety of interpretations were presented. At these workshops the various Tribes expressed somewhat different opinions concerning the interpretation of the term "Gaming Device." Most of the tribal comment focused on multi-terminal systems and whether they would be considered one Gaming Device notwithstanding the number of terminals, or accounted for as an individual Gaming Device for each terminal. In preparation of this recommendation, Commission staff considered all of the comments and input from the Tribes.

Tribes advocating the view that multi-terminal devices should be counted as single Gaming Devices advanced several arguments: The Commission had no authority to "unilaterally" interpret the compact; tribal technical standards, over which the Commission has no authority, defined multi-terminal devices as a single device; and, GLI technical standard GLI-11 defines a multi-station game as a single Gaming Device.

None of these arguments is availing. First, the Commission has not acted or prepared to act in a unilateral manner, but has solicited the input of all tribes through various means of communication including statewide workshops. Moreover, even assuming for the sake of argument, that the state has no jurisdiction with regard to tribal technical standards, no party to the Compact may, through technical standard, or otherwise, contravene the terms of the Compact. Finally, the GLI-11 argument is simply wrong. GLI-11 explicitly recognizes that "A multi-station game is a gaming device that incorporates more than one (1) player-terminal . . . ." To focus solely on the first seven words of that section for the proposition that "a multi-station game is a (single) gaming device," while ignoring the reference to "more than one (1) player-

[4] Giving words and phrases their plain meaning is a basic principle of statutory or contractual construction. It gives effect to the intent of the legislative body or the parties involved. Moreover, words are to be interpreted in their textual context to avoid rendering any word or phrase as surplusage. *City of Carson v. La Mirada* (2005 Daily Journal D.A.R. 75.)

terminal," is to take the wording of GLI-11 out of context, ignoring what is inconvenient – that a multi-station game encompasses more than one player-terminal and that the Compact repeatedly uses terminal and device interchangeably.

Finally, it must be recognized that the Compact was the product of negotiation on a government-to-government basis. Thus prudence is warranted when applying the language of the Compact. Fully honoring the language negotiated by the parties is prudent practice when implementing the Compact's provisions.[5] This is particularly true with the application of the term Gaming Device, which as pointed out, is central to the revenue sharing agreement of the signatory tribes and the acquisition of and limitations on the acquisition of Gaming Devices agreed to in the 1999 Compact. Accordingly, the analysis proffered in DGC's Advisory ("Gaming Devices") is consistent with the goal of effectuating the language of the Compact and thus a reliable guide.

Recommendation

The Commission direct staff to follow the Tribal Casino Advisory issued by the Division of Gambling Control regarding the term "Gaming Device" so that each terminal or player station attached to a gaming system is accounted for as a separate gaming device for purposes of carrying out the Commission's duties under the Compact.

cc: Eugene Balonon, Executive Director

[5] Additional persuasion supporting the goal of fully effectuating the negotiated language of the parties can be inferred from the Compact's reliance on the Commercial Arbitration Rules of the American Arbitration Association. (Compact Sec. 9.2.) Reference to those rules and the correlative Guides and Protocols reveals an alternative dispute resolution system dependent upon fully effectuating the contracts and agreements negotiated by parties in a commercial setting.

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October 9, 2003

Confidential Attorney-Client Communication

Pete Melnicoe, Chief Counsel
Gambling Control Commission
2399 Gateway Oaks Drive, Suite 100
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RE: *Electronic Roulette and Craps Games*

Dear Mr. Melnicoe:

This is in response to your May 19, 2003 request for informal advice regarding how certain electronic roulette and craps games being played in various tribal casinos should be counted for purposes of determining the Tribe's gaming device allotment under the Tribal-State Gaming Compacts ("Compact"). Section 4.3.2.2 of the Compact limits the number of gaming device licenses a Compact Tribe may acquire to 2000 and also provides a fee schedule for obtaining licenses.[1] The electronic roulette and craps games are played from multiple terminals. At each separate terminal, players wager against a common outcome. The examples given include: in roulette, the electronic spin of the roulette wheel and in craps, an electronic roll of the dice. The issue is whether the entire system or each separate terminal counts as a gaming device.

It is our opinion, based on the definition of "Gaming Device" in section 2.6 of the Compact, that each separate terminal should be counted as a Gaming Device for purposes of

[1]Under the section, a Tribe is not required to pay a fee for the first three hundred and fifty (350) gaming device licenses. For licenses in excess of three hundred and fifty, the Tribe pays into the Revenue Sharing Trust Fund $900.00 for each gaming device license between three hundred and fifty (350) and seven hundred and fifty (750), $1,950.00 for each gaming device license between seven hundred and fifty-one (751) and one thousand, two hundred and fifty (1,250), and $4,350.00 for each gaming device between one thousand, two hundred and fifty-one (1,251) and two thousand (2000).

determining the Tribe's Gaming Device allotment.[2] In order to give meaning to every provision in the Compact's definition, Compact section 2.6 should be interpreted to classify each separate terminal of the above-described games as a Gaming Device.

ANALYSIS

Compact section 2.6 reads as follows:

> "Gaming Device" means a slot machine, *including an electronic, electromechanical, electrical, or video device that* for consideration, *permits*: individual play with or against that device or *the participation in any electronic, electromechanical, electrical, or video system to which that device is connected*; the playing of games thereon or therewith, including, but not limited to, the playing of facsimiles of games of chance or skill; the possible delivery of, or entitlement by the player to, a prize or something of value as a result of the application of an element of chance; and a method for viewing the outcome, prize won, and other information regarding the playing of games thereon or therewith.

(Italics added.) The above-emphasized language in this definition anticipates the situation we are now faced with, the playing of a single game from multiple connected terminals. Based on this language, to be considered a Gaming Device, the terminal does not have to be a stand-alone device that contains all aspects of the game.

In construing the Compact's language, the courts should give effect to every word and avoid a construction making any word surplusage. (See *Bennett v. Spears* (1998) 520 U.S. 154, 173 and *Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1410 [interpreting statutory language]; Civil Code § 1641 [requiring, if practicable, that every part of a contract be given effect].) If we were to interpret "Gaming Device" to only include stand-alone devices, the above language would be surplusage.

Further, the Compact itself makes it clear that each gaming "terminal" must be counted as a "Gaming Device," by its use of the terms "Gaming Device" and "terminal" interchangeably.

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[2]Whether the electronic roulette and craps games constitute legal slot machines within the meaning of article IV, section 19, subdivision (f), of the California Constitution, which authorized the Governor to negotiate and conclude compacts for the "operation of slot machines," is an issue that is not addressed herein.

> Sec. 4.3.1 The Tribe may operate no more *Gaming Devices* than the larger of the following:
>
> (a) *A number of terminals equal to the number of Gaming Devices* operated by the Tribe on September 1, 1999; or
>
> (b) Three hundred fifty (350) *Gaming Devices*.

(Compact, § 4.3.1, italics added.) Compact section 5.1(a) sets forth a chart establishing the amount of money tribes have to pay into the Special Distribution Fund, based upon the "Number of *Terminals* in Quarterly *Device Base*," and the "Percent of Average *Gaming Device* Net Win" column in that chart sets a percentage based upon the number of "terminals" a tribe has in operation.[3] (Italics added.) Section 5.3 also makes it clear that a "terminal" is to be counted as a "Gaming Device."

> The quarterly contributions due under Section 5.1 shall be determined and made not later than the thirtieth (30th) day following the end of each calendar quarter by first determining the total number of all *Gaming Devices* operated by a Tribe during a given quarter ("Quarterly *Device Base*"). The "*Average Device Net Win*" is calculated by dividing the total Net Win from all *terminals* during the quarter by the Quarterly *Terminal Base*.

(Compact, § 5.3(a), italics added.)

> At the time each quarterly contribution is made, the Tribe shall submit to the State a report (the "Quarterly Contribution Report") certified by an authorized representative of the Tribe reflecting the Quarterly *Device Base*, the Net Win from *all terminals in the Quarterly Device Base* (broken down by *Gaming Device*), and the Average Device Net Win.

(Compact, § 5.3(c), italics added.)

Finally, as previously described, section 4.3.2.2 of the Compact limits the number of gaming devices allotted to Tribes to 2000. If the central server system was counted as one gaming device, section 4.3.2.2's limitation would have no meaning. A Tribe could expand its gaming floor by simply adding a central server system, which would operate the play of

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[3] "7 % applied to the excess over 200 terminals, up to 500 terminals, plus 10% applied to terminals over 500 terminals, up to 1000 terminals." (Compact, § 5.1(a).)

potentially thousands of player station terminals at the tribal casino and thereby, circumvent section 4.3.2.2's gaming device limitation and the payment of fees into the Revenue Sharing Trust Fund. Accordingly, it is our opinion that each terminal of these gaming systems should be counted as one Gaming Device.

If further assistance is needed on this subject, please do not hesitate to contact me at the number above.

Sincerely,

C Murphy

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Deputy Attorney General

For BILL LOCKYER
Attorney General

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DIVISION OF GAMBLING CONTROL

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Director

MULTIPLE PLAYER STATIONS AS "GAMING DEVICE"

In furtherance of the Government-to-Government relationship existing between the State and the Indian Tribes of California that are authorized by the Tribal State Gaming Compacts now in force to conduct Class III gaming, the Division of Gambling Control, as a component of the State Gaming Agency identified in those Compacts, will from time to time provide information in the form of advisories concerning its practices on matters within the scope of its responsibility under those Compacts. The purpose of an advisory is informational. An advisory does not constitute legal advice.

Cyberview Technology is offering an on-line gaming central server system which has the capacity to service thousands of Gaming Devices. This product is currently being tested at Gaming Laboratories International in Las Vegas, Nevada, for use in the United States. This multi-player station gaming system has the capacity to operate the play of potentially thousands of player-station terminals connected to a single random number generator (RNG).

The Division of Gambling Control considers each separate player station terminal to be a Gaming Device for purposes of determining the Tribe's Gaming Device Allotment. In effect, each terminal of these gaming systems is considered to be one Gaming Device.

For more information regarding this advisory, contact the California Department of Justice, Division of Gambling Control, at (916) 263-3408.

DGC-Adm. 012 (New 5-4-99)